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Supreme Court of the United States

October Term, 1958

No. 812

JOSEPH GORSKA,

Petitioner,

against

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph Gorska, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, entered on the 5th day of January, 1959.

Official Report of the Court Below

The decision of Thomas F. Murphy, Judge of the District Court for the Southern District of New York, dated March 6, 1957.

The decision of the Court of Appeals for the Second Circuit has been officially reported at 262 F. 2d 198 (Appendix A).

Jurisdiction

The opinion of the Court below was filed on January 5, 1959.

Jurisdiction to review this decision is predicated upon Title 28, U. S. C., Section 1257.

Original jurisdiction is based upon an action brought under 46 U. S. C. A. Section 688 (Jones Act).

Question Presented

Has the Court of Appeals for the Second Circuit correctly interpreted the provisions of Rule 52(a) of the Federal Rules of Civil Procedure when said Court held, in substance, without regard to the testimony at the trial, that a judgment by a Trial Judge in a Jones Act case is final, inviolate and unassailable, irrespective of the fact that the decision of the Trial Court was based on remote possibility, speculation, surmise and conjecture and not based on competent legally admissible evidence, but grounded on erroneously interpreted legal decisions applied in such manner as to establish findings of fact in direct conflict with the well established and uniform law of evidence, both state and federal?

Reasons for Granting the Writ

First: There is a conflict of decision between the Court of Appeals for the Second Circuit and the Court of Appeals for the Seventh Circuit. (*Wheat* v. *Baltimore & Ohio Railroad Company*, decided January 12, 1959, 262 F. 2d 289.)

Second: There is a conflict of decision between the Court of Appeals for the Second Circuit and the New York Court of Appeals. (*Williams* v. *Alexander*, 309 N. Y. 283, 288, 129 N. E. 2d 417.)

Third: A Federal Rule of Civil Procedure has been erroneously interpreted in a manner destroying remedial rights granted by Congress. (Rule 52(a) of the Federal Rules of Civil Procedure; 46 U. S. C. A. Section 688, Jones Act.)

Fourth: A radical departure from uniform decision, both state and federal, has been enunciated by the Court below, sustaining a trial court in a decision holding, in effect, that a seaman may recover maintenance and cure on the basis of preponderance of evidence, but in order to

recover damages in the same action must present proof beyond a reasonable doubt.

Fifth: The decision of the Court below, in fact, denies to a seaman the right to appeal in a Jones Act case, retaining only the form but destroying the substance.

Sixth: The Court below has erroneously enunciated principles of law applicable to negative testimony which is in conflict with rules of evidence uniformly adhered to by both federal and state courts.

Seventh: The Court below has interpreted a federal rule (52(a) of the Federal Rules of Civil Procedure) in a manner which renders inexorable and inviolate the decision by a Trial Court of a Jones Act case and gives to such judgment unassailable finality, thus destroying the intent of Congress, as provided by the Jones Act, 46 U. S. C. A. sec. 688. Congress never intended that a seaman should be bound by the decision of a Trial Court in a Jones Act case, unsupported by competent testimony, without the right to appeal. An appeal which is limited to a review of the opinion of the Trial Court, without regard to the fact that the record demonstrates that the decision lacked support of competent legally admissible evidence, and in addition, where the findings of fact were bottomed on erroneously interpreted legal decisions directly violating the well established and uniform law of evidence of both state and federal courts, constitutes an empty gesture and does not carry out the remedial provisions granted by Congress to injured seamen.

Eighth: A radical and erroneous principle of law has been established by the Court below by a complete departure from the rules of evidence, both state and federal, in placing its stamp of approval on a judgment of a Trial Court in a Jones Act case, in disregard of the record which demonstrates that the judgment was based on hearsay evidence, legally incorrect inferences, speculation, surmise, conjecture, remote possibility and most erroneous interpretation of legal decisions.

ANALYSIS OF THE REASONS FOR GRANTING THE WRIT

Facts

The trial was started with a jury of twelve. One of the jurors took sick and on the refusal of defense counsel to go on with eleven jurors, petitioner's counsel stipulated to waive a jury.

At the time of the accident, petitioner was employed as a floatman on the tug *Atlantic City*, owned and operated by respondent and on the evening of February 16th, 1955, this tug was enaged in moving barges in a slip in Jersey City, New Jersey.

Petitioner testified that the accident occurred about 8 P. M. when he was standing on the right side of the forward end of a covered barge that was being pushed into a slip in Jersey City by the tug *Atlantic City*.

At that time the tug had as its crew in addition to the petitioner, its captain Costello, its mate Malvicini, a deck hand Ferrara, the engineer Peters and two other persons who were in the engine room with Peters (8a).

There was a house on the barge (4a, 14a) that extended practically the width of the barge with about 1 foot on either side of the house to the side of the barge (212) and about 5 feet from the front of the house to the front of the barge (212). The house was about 15 feet high (32a).

As the barge was being moved into the slip where the accident occurred, the left side of the barge was held to the right side of the tug by two lines, both about two inches in diameter, the front line being fastened to a bitt about 4 or 5 feet from the front end of the barge (48) and the other end of the line to a bitt which was located at about the point of the tug (71); the second line was fastened to a bitt on the barge which was about 30 feet from the front of the barge and the other end to a bitt on the tug about

30 feet from the forward bitt (61). The barge was empty (4a) because of which the deck would be 5 or 6 feet above the water (376).

The front of the barge was flush and at the time of the accident was about 3 feet in front of the point of the tug (7a). The front of the barge was about 20 feet away from the point of the tug (8a), but the tug and barge were close together at the second line (8a).

Petitioner himself gave the only testimony as to how the accident occurred, a fact found by the Court.

It was undisputed that the captain of the tug, Costello, was in the pilot house on the tug from the time he first started his shift about 5 P. M. till about midnight except for a cup of coffee at about 7 P. M. (22a).

The deck hand Ferrara likewise was at all the times on the tug at its stern and never came on the barge that night (37a).

The mate Malvicini was on the tug and probably on the barge obeying whistle orders but only when they were given by the captain (36a).

The engineer Peters was in the engine room on the tug (35a).

The other two persons that were in the engine room of the tug on the night of the accident were not identified by name nor were they called as witnesses by respondent nor did respondent attempt to make any explanation for its failure to call them.

The petitioner was the only one who testified as to the happening of the accident which was, in substance, that he wrenched his back and suffered the injuries complained of as a result of the barge being secured alongside the tugboat instead of aft thereof.

Captain Costello admitted that if the physical conditions were as described by petitioner, and as subsequently

found by the Trial Court to be a fact, that the manner in which his tug was secured to the barge did not constitute reasonable prudence under the circumstances.

The Court below has assumed the authority to disregard the rules of evidence which safeguard the rights of seamen to remedies provided by Congress, by completely ignoring the record and disregarding the evidence and giving to the provisions of Rule 52A of the Federal Rules of Civil Procedure a meaning repugnant to its very intent.

The decision of the Court below is in direct conflict with the decision by the United States Court of Appeals for the Seventh Circuit in *Wheat* v. *Baltimore & Ohio Railroad Company*, decided January 12, 1959, 262 F. 2d 289, which held that no probative effect could be given to negative testimony by witnesses concerning the absence of sound, without first establishing the fact that such witnesses were in sufficiently close proximity to the place where the sound was alleged to come from.

The Court below held contrary, stating, concerning respondent's witnesses who "* * * were not on the barge such a collision might have occurred without transmitting the shock to the tug and thus escaped their notice"—"* * * is not without probative force * * *."

The testimony by respondent's witnesses denying the accident have no probative value, as the conclusions are not based on facts within their knowledge or which were within reach of their sense of sound or observation, proof of which facts is mandatory before conclusions can be accepted in evidence (Wigmore on Evidence, pages 659-664). (See opinion in the case at bar, 262 F. 2d 198, at page 199.)

The absence of the details of an accident in a Public Health Service Hospital record by a Dr. Rednik, who did not recall whether he had been told the details or not by Gorska, was accepted as evidence that Gorska was not injured in the manner he claimed.

This is in direct conflict with the decision by the New York Court of Appeals in *Williams* v. *Alexander*, 309 N. Y. 283, 288, 129 N. E. 2d 417, which held:

> "Such reasoning, however, will not support the use, or justify the receipt, of a statement detailing the circumstances of the accident where they are immaterial to, and were never intended to be relied upon in the treatment of the patient. There is no need in that case for the physician to exercise care in obtaining and recording the information or to question the version, whatever it might be, that is given to him. The particulars may be a natural subject of the doctor's curiosity, but neither the inquiry nor the response properly belongs in a record designed to reflect the regular course of the hospital's business."

The Court below held that testimony of witnesses who denied any knowledge of the accident had greater probative value than the hospital records which contained the following:

> " 'male AS tug boat hand stated 2/16/55 felt pain in lower mid back while throwing tow line. This pain (moderate) was evanescent thru out 2/16/55.' "

The uncontradicted testimony of Gorska, in substance, that he was thrown off balance as the barge struck the jammed ice in the slip (8a); the testimony of Dr. Stookey that in his opinion the injuries were suffered as a result of the accident complained of (20a); the natural phenomena that a vessel operated in an ice jammed slip must necessarily strike the massive ice pack; the physical force required to propel two vessels secured together, the fore part of both covering an area of some 45 to 50 feet; the testimony of two experts that the manner of the operation of the vessels would necessarily have to cause the self evident fact which was collision with the ice jam (30a, 33a) and the admission by respondent's Captain Costello that a slip packed with ice, some pieces as large as 6' by 6' and

6 inches above the water, required clearing a path by a tug without a barge attached to it (34a).

This is in direct conflict with the case of *Cornbrooks* v. *Terminal Barber Shops, Inc.*, 282 N. Y. 217, 223, 26 N. E. 2d 25, as well as in the case of *Stone* v. *Stone*, 136 Fed. 2d 761, 764, which held as follows:

> "In this case, there was positive testimony uncontradicted and not inherently improbable, neither a jury nor a judge is at liberty to disregard such evidence.
>
> * * *
>
> "Where the testimony is all one way and is not immaterial, irrelevant, improbable, inconsistent, contradicted or discredited, such testimony cannot be disregarded or ignored by judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results, for which the verdict or decision, if reviewable, must be set aside. To hold otherwise, would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen."

In *Cornbrooks* v. *Terminal Barber Shops, Inc.*, 282 N. Y. 217, 223, 26 N. E. 2d 25:

> "In support of that assertion the defendant cites testimony by its experts that the injury to plaintiff's eye might have been caused by a jolt or jarring sustained in a subway train, a taxicab or a bus which the plaintiff admits were the type of conveyance in which he rode on January 9th after leaving the defendant's shop. But the significant fact is that the record contains no proof that plaintiff had been jarred or jolted at any time and to the contrary, the plaintiff denied such an occurrence."

An Analysis of the Decision by the Court Below, Demonstrates Lack of Legal or Factual Support for a Denial of Damages to Petitioner

The opinion of the Court below indicates that the Court did not read the record on appeal or disregarded the testimony and accepted the opinion of the Trial Court as unreversible.

The fact that the Court below did not read the record or just disregarded the evidence, is demonstrated by the fact that the opinion fails to mention:

a. The nature of the vessels, their dimensions, manner in which the barge was secured to the tug.

b. The circumstances under which the operation was being conducted and the vessels maneuvered.

c. The Captain's admissions which would constitute liability on the basis of the Trial Court's finding that the ship was jammed with ice.

d. The fact that the fundamental and basic issue of fact as to the occurrence of an accident was seriously contested by respondent and resolved in petitioner's favor.

e. That the Trial Court had rejected respondent's denial of any accident.

f. That the two marine experts had given opinions, in substance, testifying that the type of collision complained of was inevitable under the prevailing circumstances.

g. That Dr. Stookey gave his opinion that the impact with the ice caused the injury.

h. That witnesses that could have been called by respondent were not called.

i. That the denial of a report of an accident by Gorska to respondent's witnesses was implicit within the denial by respondent of any injury to Gorska. That despite this

testimony being rejected by the Trial Court, the Court below based its decision, in part, on the denials of the discredited witnesses.

j. That the Court below apparently was not aware of the fact that Dr. Rednick did not testify that Gorska failed to report the details of the accident to him, merely that he did not remember whether Gorska did or not.

k. That the Court below based its decision, in part, that Gorska did not call witnesses to corroborate the fact that he had spoken of the accident to them. Had the Court below read the record, it would have appeared that Gorska did in fact make an offer of proof as these facts. (The Trial Court excluded such proffered proof, but did accept self serving documents and hearsay testmony offered by respondent.)

l. In addition to failing to read the record or disregarding the same, the Court below failed to take into account the inconsistent findings by the Trial Court. The Trial Court stated "we are not at all satisfied that the injury to plaintiff's back happened either on the day that he has testified to or in the manner in which he has described", and despite this finding, granted judgment for maintenance to petitioner on the basis of the accident.

m. In addition to the apparent failure to read the record or consider the evidence, there was no consideration of the applicable law as to liability, particularly where the judgment of the Trial Court was such as imposed a duty on the Appellate Court to review the entire record.

The Court below made the following finding:

> "Plaintiff, the only witness to the alleged accident, claimed that as he was about to throw the mooring rope the barge violently collided with a block of ice in the slip, causing him to twist his back so as to produce the admitted injuries."

This part of the decision is supported by the following testimony by petitioner, Joseph Gorska, in answer to the Court's questions:

> "The Court: Well, before that, would you tell the jury again how it was you wrenched your back?
>
> The Witness: I had the line in my hand, ready to throw onto a cleat, to make fast the barge to the pier, and I had the line in my hand and when we were coming in we hit the piece of ice flush, like the ice was here, and we were coming in this way, and we hit like that, and I had the line in my hand, and it just wrenched my back, in this position like, and * * *" (6a).
>
> "The Court: Excuse me, did you fall?
>
> The Witness: No, sir.
>
> The Court: Were you facing the pier?
>
> The Witness: Yes, sir.
>
> The Court: Stand up and show the jury what happened to your back, just at the time of the impact, that is, when it happened?
>
> The Witness: Yes sir (demonstrated).
>
> The Court: Now, show the jury how you were holding the rope and what happened at the impact.
>
> The Witness: Well, I had the rope in my hand, like this, coiled up, and they got these eyes that you have to throw the rope over. I was standing on the end, like this, ready to throw it on the eye, when we hit this piece of ice; and with the rope, with the weight of the ropein my hand, it pulled me over this way and I did not fall or anything, I just felt a sharp pain in my—the lower part of my back" (6a).

The Trial Court found that the injuries included the following:

> "With reference to his injuries it appears to be uncontradicted that he suffered a massive herniated disc in the lumbar region of his spine and that an hemilaminectomy was performed but as a result of either that or some exploratory work in other intervertebral spaces he suffered, and is still suffering,

> a drop in his left foot which has necessitated the wearing of a steel brace to prevent him from falling or tripping." (40a)

The opinion of the Court below continues as follows:

> "The district court did find that ice was prevalent in the slip at the time."

This part of the opinion of the Court below is supported by the finding of the Trial Court as follows:

> "• • • with ice in various sizes and shapes, some as large as 6' x 6' and all approximately 4" to 6" thick."

In turn, the finding of the Trial Court is supported by the following evidence of Malvicini, the respondent's mate:

> "Malvicini testified that there were chunks of ice in the slip six feet square and four feet square (24a); and in his deposition before trial he said that some pieces were 10 feet long and 10 feet wide (24a); some of the ice was four inches thick above the water." (646)

The balance of the decision lacks factual support by any evidence and is based on erroneous interpretation of applicable law.

Incompetent testimony by people who were not in a position to know the facts and who testified that they had no recollection of an impact constituted a basis for the decision of the Court below,

> "However, other employees of the respondent who were present on the tug at the time of the alleged collision testified to no recollection of an impact. Their testimony is not without probative force, but since they were not on the barge, such a collision might have occurred without transmitting shock to the tug and thus escape their notice."

The fact that the Trial Court had rejected the testimony of said witnesses who had denied that an accident had oc-

curred, and accepted the testimony of Gorska that the accident did occur, was disregarded by the Court below.

The incompetent testimony of the discredited witnesses was adopted by the Court below as a basis for its decision as outweighing the unimpeached testimony of the petitioner, which was as follows:

> "We were cutting into this door where we had to bring this barge to get loaded up, and as we were cutting in there was this big chunk of ice in front of us and I was standing on the end of the barge, which is the front end, with a line in my hand, ready to throw it on a cleat." (5a)
>
> "While we were coming in, I had the rope in my hand, ready to throw it, and we hit this piece of ice that was between the pier and us. We hit this piece of ice and it just wrenched my back a little. There was a sharp pain. It was all I felt and then it got numb." (5a)

On cross-examination, he testified further as follows:

> "We were approaching the southeast corner of the slip where this barge was to be tied up, that I was on. We were approaching it, and I had the line coiled in my hand, I would say we were about 15 feet away, and I had the line coiled up in my hand, ready to throw it, and as we come in closer we hit that piece of ice and that's what jarred me and it just whipped to the side." (16a)
>
> "Q. Will you tell us what kind of an impact there was between this barge and this ice? A. I know we banged it, and you could hear that we banged it." (16a)

The Court below erroneously interpreted a finding of fact diametrically contrary to its true meaning.

There was no testimony by any witness who was actually asked and who expressed a denial that he had been told by Gorska of the accident shortly after its occurance.

Implicit with the denial of the happening of any accident is the denial of any report thereof by Gorska. This ques-

tion, however, was resolved by the Trial Court in Gorska's favor and an award of maintenance and cure was made by the Trial Court.

Accordingly, there is no basis in law or fact for the following part of the decision by the Court below:

> "Furthermore, although plaintiff claimed that he had told several persons of the alleged cause of the accident shortly after the injury. those who were called denied that he had done so."

There is no legal authority for the presumption that the failure of the petitioner to call one of several medical witnesses and produce his records, equally available to the Pennsylvania Railroad Company as to Gorska, constitutes a legal basis for the presumption that if said doctor were called or such records produced that they would constitute a complete, or for that matter *any* contradiction of Gorska's testimony, and therefore, there is no support in law or fact for the following part of the decision of the Court below:

> "* * * and neither plaintiff's doctor, who treated him subsequent to the injury, nor the doctor's records were produced."

The Court below erroneously held that a hospital record reciting an injury but not the details as to its occurrence, constitutes proof that the accident did not occur as subsequently claimed by the injured person.

This novel approach as to negative testimony is predicated on the fact that the Public Health Service hospital Dr. Rednick failed to make an entry in the hospital history as to the manner of the happening of the accident. It is interesting to note that the doctor did not deny that he was told by Gorska as to the manner of the happening of the accident. Dr. Rednick did not recall whether or not Gorska had told him about the impact, and the Court below considered such testimony as a basis for finding that, in fact, there was no impact. Both the Trial Court and the Court

below made the unwarranted and unjustifiable finding that there was no impact, the Court below stating:

> "Finally, although the record of the plaintiff's subsequent admission to the Public Health Service Hospital, nine days after the injury and after private treatment, did disclose that he then claimed that the injury occurred while he was in the course of throwing the rope, it recited no claim of an accompanying impact."

The Court below did not consider the record or any of the evidence submitted at the trial, but predicated its decision entirely and exclusively on the opinion of the Trial Court.

It is most surprising that the evidence of liability, as testified to by the captain of the Pennsylvania Railroad Company tug, was not considered by the Trial Court nor the Court below.

Captain Costello conceded facts which would constitute liability under all applicable law. In spite of this concession of liability in the light of applicable law, the Trial Court chose to disregard said law and the Court below apparently refused to go beyond the Trial Court's opinion and consider the record.

Captain Costello testified as follows:

> "Q. That is correct. If you saw pieces of ice six inches above the surface of the water six feet long and six feet wide packed in that slip, then you would have use a tugboat to clear a path first, is that right?
>
> Mr. Kaplow: I object to the form of the question.
>
> The Court: I will allow it.
>
> A. I probably would have, yes." (34a)

Captain Costello testified as to the standard of care which would constitute good practice. He, in substance,

testified that if the conditions existed as contended by petitioner, then he would have used a tugboat to clear the path first instead of having the barge secured alongside the tugboat creating a large wide frontal, striking the congested ice rather than the sharp bow of a tugboat.

On the basis of just and proper evaluation of such concession by the master of the tugboat in question, and the Trial Court having found as a fact that the slip was congested with ice four to six inches thick, some pieces as large as six feet by six feet, it seems that a proper evaluation of such evidence in the light of the factual finding by the Court as to the physical conditions which existed demanded a decision in Gorska's favor, and any adverse decision was in violation of the provisions of the Jones Act and contrary to the intent of Congress in its enactment of the remedial legislation 46 U. S. C. A. sec. 688.

Dr. Byron Stookey, recognized as one of the most able neurologists in the United States testified that in his opinion the impact was the competent producing cause of the accident. This positive and direct testimony was rejected in favor of the statement that other causes could possibly have resulted in the same injury.

The Court below failed to consider the nature of the injury as resulting only from severe external force sufficient to throw Gorska off balance despite the fact the Trial Court commented, "The testimony of defendant's medical expert was substantially to the same effect as plaintiff's except that in his opinion such a massive herniation could not occur without a violent blow or twisting."

The Trial Court, as Well as the Court Below, Disregarded the Applicable Law

In *Kernan* v. *American Dredging Co.*, 78 S. Ct. Rep. 394, the Court said at page 398:

> "But instead of a detailed statute codifying common law principles, Congress saw fit to enact a

statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers, Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 508, 510, 77 S. Ct. 443, 449-450, 1 L. Ed. 2d 493, and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers."

and later, at page 401:

"We find no difficulty in applying these principles, developed under the FELA, to the present action under the Jones Act, for the latter Act expressly provides for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers by the FELA. The deceased seaman here was in a position perfectly analogous to that of the railroad workers allowed recovery in the line of cases we have discussed, and the principles governing those cases clearly should apply here."

In *Arnold* v. *Panhandle and Santa Fe Railway Co.*, 353 U. S. 360, 77 S. Ct. Rep. 840, the Court said:

"We, therefore, cannot accept interpretations that nullify their effectiveness."

In *Rogers* v. *Missouri Pacific Railway Co.*, 352 U. S. 500, 77 S. Ct. 443, at page 506:

"Under this statute, the testimony of a jury case is simply whether the proof justified, with reason, the conclusion that employer's negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

* * *

"The statute expressly impresses liability upon the employer to pay damages for injury or death due 'in whole or in part to its negligence'."

In *Ringhiser* v. *Chesapeake & Ohio Railway Co.*, 354 U. S. 901, 77 S. Ct. 1093, 1094:

> "In that circumstance there were probative facts from which the jury could find that respondent was or should have been aware of conditions which created the likelihood that the petitioner would suffer just such an injury as he did."

Failure to use reasonable care under the circumstances was established by the testimony of two expert witnesses, Jacobson and Labato, called by the petitioner, in addition to the admissions made by Captain Costello, as heretofore stated.

In *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502, 510:

> "In view of the weather conditions and the observance of ice in the river some days prior to the accident by several witnesses, amongst them one of Stover's own subordinates, he should not have rested upon the mere instruction to the master not to run through ice. Before allowing the ferriage operation, he was under obligation to assure himself by inquiries or by personal inspection that the 'Linseed King' should not incur the hazard of colliding, as she did, with ice floes in the river."

In *The Bern*, 213 Fed. 630, 631:

> "However, when she got over towards the New York shores, she found heavy ice and should then, if she decided to go on, have dropped the scow astern."

In *The Bear*, 11 Fed. 2d, 607:

> "I therefore find that the planks in the bow of the Clark Line were broken by the tug bringing her in contact with the ice, while the tug had the barge in tow alongside and was attempting to force her through the ice, instead of having the barge in tow on two short hawsers and the tug breaking the ice, and that the tug was guilty of negligence in so doing, in view of the conditions then existing, which were known or should have been known to the tug. The Bern, 213 F. 630, 130 C. C. A. 294."

In *The Janice*, 13 Fed. Supp. 348, 350:

> "It would seem to me that the conclusion is inescapable that the improper towing by the Cornell No. 20 in taking the Janice alongside, in view of the prevailing conditions in the river, was the cause of the damage. The case is not unlike The Bear (D. C.), 11 F. (2d) 607, in which negligence was found in attempting to force the barge while alongside through the ice, instead of towing it at the stern on short hawsers. See also, The Mary C. Black (D. C.), 40 F. (2d) 304."

In *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443, the Court said in speaking of the failure of the defendant to provide adequate and sufficient footing for the plaintiff

> "These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just an injury as he did."

In *Webb* v. *Illinois Central Railroad Company*, 352 U. S. 512, 77 S. Ct. 451 the Court discussing the presence of large clinkers in the employer's roadbed causing plaintiff to fall said:

> "In this posture of the proofs, there is ample evidence for a jury to determine whether the procedure followed satisfied the standard to be expected from a prudent man in sight of the hazard to be presented."

In *Ferguson* v. *Moore-McCormack Lines Inc.*, 352 U. S. 521, 77 S. Ct. 457

> "On this record, fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with despatch, since no adequate implement was furnished him."

In *Gibson* v. *Thomson, Trustee*, 78 S. Ct. Rep. 2, it was held to be a question for the jury as to whether the negligence of the defendant contributed to the accident when plaintiff fell becuse loose gravel underfoot shifted.

In *Ringhiser* v. *Chesapeake & Ohio Ry. Co.*, 354 U. S. 901, 77 S. Ct. 1093 plaintiff was using a gondola car to answer the call of nature and was injured when that car was strick by another car engaged in switching operations. The Court said:

> "In that circumstance there were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner would suffer just such an injury as he did."

In *Kernan* v. *American Dredging Company*, 78 S. Ct. 394 the Court upheld a claim for liability as a result of the death of a seaman when an open-flame kerosene lamp, which was on the deck of tug and which was not more than three feet above water instead of eight feet above as required by navigation rule, ignited vapors lying above extensive accumulation of petroleum products spread over the surface of the river even though such navigation rule was not intended for the protection of seaman and even though there was no negligence on the part of owner of the tug. The Court said:

> "The deceased seaman here was in a position perfectly analogous to that of railroad workers allowed recovery in the line of cases we have discussed, and the principles governing those cases should apply here."

In *International Merchant Marine Steamship Company* v. *Fletcher*, 296 Fed. 858:

> "Liability is measured by the known dangers to be guarded against and if care, according to the circumstances, is wanting, the natural inference is that injury occurred from the known danger—it is caused by lack of care."

The doctrine of *res ipsa loquitur* applies, because dangerously large pieces of ice were in the slip, the employees of the respondent knew they were there, the barge should have been towed at the stern of the tug thus requiring the respondent to explain the accident.

Jesionowski v. *Boston & Maine Railroad Company*, 329 U. S. 452.

In *The Severance*, 152 Fed. 2d Series, 916, Cert. Denied, 328 U. S. 983, the Court said:

> "We start with the rule that when the 'Severance' in complete control of Dosher, in waters with which he was familiar, on a clear day with a light wind, ran into a readily visible stationary object, the piling of the bridge, this raises a presumption of negligence on Dosher's part that at least calls for some reasonable explanation of the collision."

In *The Virginia Ehrman*, 97 U. S. 309, 315:

> "the rule being that the vessel in motion must exonerate herself from blame, by showing that it was not in her power to prevent the collision by adopting every practicable precaution."

The large pieces of ice were concededly in the slip. The barge continuously moving into and against these large pieces of ice in the slip must of necessity strike them.

Under these decisions it was incumbent upon respondent to prove that it could not prevent the collision between the barge and the large block of ice that caused the injury to the petitioner.

There is not a scintilla of proof anywhere in the record nor any possible inference from any evidence as to how the petitioner was injured other than in his own testimony.

This statement is confirmed by the opinion of the Court wherein it is stated that no witness of the respondent saw the accident.

He testified that he threw the rope after he was hurt.

The conclusion of the Court that he sustained his injury while throwing a rope cannot be sustained as a matter of law for the following reasons:

No Court is Justified in Making Any Finding that is Not Based on the Evidence

In the *Petition of Skibs A/S Jolund*, 250 Fed. (2d) 777, at page 782:

> "If we assume, as did the trial judge, that the failure to cover the stow was negligence, it is our opinion that the quoted findings to the effect that the failure to cover the naphthalene could not have been a contributing cause of the fire, were clearly erroneous."
>
> • • •
>
> "The Judge's theory there disclosed, is that if the stow had been covered by a tarpaulin, the gases and the creosote oil given off by the crude naphthalene would have impregnated the tarpaulin or saturated it and made it as inflammable as the impregnated bagging. There is no such evidence in the record" (783).

In *United States of America* v. *Edward J. Wilson*, 235 F. (2d), 251:

> "Although there was some evidence that the barge had been deliberately scuttled in 1938, there was no finding, and no evidence to support a finding, that the scuttling was done at Wilson's behest or with his knowledge."

In *Wetherbee* v. *Elgin Joliet & Eastern Railway Co.*, 191 F. (2d) 302, at page 310, the Court said:

> "A jury does not have the power to render a capricious and arbitrary verdict in total disregard of the evidence."

In *Dobbins* v. *Brown*, 119 N. Y. 188, 194:

> "Any inference that the accident happened in the manner suggested, would, it seems to us, have been substituting conjecture for proof and violated the rule requiring proof always to be made the basis of recovery."

In the *Matter of Case*, 214 N. Y. 199, 203:

> "It is still the rule, however, even in this Court, that 'insufficient evidence is, in the eye of the law, no evidence'."

In *Blum* v. *Fresh Grown Preserve Corp.*, 292 N. Y. 241, 245:

> "The Courts below have not mistaken their power. They have found that by no rational process could the trier of the facts base a finding in favor of the defendant upon the evidence here presented.
>
> This Court has frequently pointed out that 'insufficient evidence is, in the eye of the law, no evidence'."

No Court is Justified in Making Any Finding Where it is Based Upon Mere Conjecture, Surmise and Speculation

In *Moore* v. *Chesapeake & Ohio*, 340 U. S. 573, 578:

> "Speculation cannot supply the place of proof."

In *Galloway* v. *United States*, 319 U. S. page 372, at 395:

> "Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonable possible inference favoring the party whose case is attacked."

In *McNamara* v. *American Motors Corporation*, 247 F. (2d) 445-450:

> "If is settled law that verdicts may not rest upon mere guess or conjecture."

In *Laidlaw v. Sage*, 158 N. Y., page 73, at 97:

> "Thus we see that this Court has, in a long line of decisions, held that, to justify the submission to the jury of any issue, there must be sufficient proof to sustain the claim of the party, upon whom the onus rests, and that mere conjecture, surmise, speculation, bare possibility, or a mere scintilla of evidence, is not enough."

In *Demjanik v. Kultau*, 242 App. Div. 255, 256:

> "A verdict, however, cannot be based upon a surmise or conjecture. That is altogether too scanty evidence. Imagination cannot take the place of convincing proof."

No Court is Justified in Making Findings that Are Based Solely Upon His Disbelief in the Testimony of the Witness

In *Mandelbaum* v. *United States*, 251 Fed. 2d, 748, 752, the Court said:

> "However, there is present one other factor to consider. The judge below disbelieved Savage when he testified that all afternoon he had been trying to find his way back to Fort Hamilton. Does such disbelief of the witness on the part of the judge amount to evidence having positive probative value tending to prove the opposite of that to which the witness testified, viz, that he was in fact on a frolic of his own and hence outside the scope of his employment? We think not. This view is supported by the case of Mosson v. Liberty Fast Freight Co., 2 Cir. 124 F. 2d 448. This was also a case decided under New York law, in which it was held, in an opinion by Judge L. Hand, that disbelief by a jury of testimony of three witnesses that plaintiff's decedent did not have control of the car's operation would not warrant the jury in finding the existence of control in the decedent. The disbelief of a witness does not necessarily establish an affirmative case."

In *Mosson* v. *Liberty Fast Freight Co. Inc.*, 124 Fed. 2d, 448, 450:

"We cannot supply the absence of palpable evidence by supposition; it is one thing to give a jury latitude to discredit testimony, and another to assume that evidence existed which does not appear. Nor does it follow because they may disbelieve a witness's denial that they have warrant for finding the existence of the fact denied; those are not the only possibilities."

In *Gendler Paeschke & Frey Co.* v. *City of Milwaukee*, 133 N. W. 835-837 (Wis.):

"True, the uncontradicted, positive, consistent evidence of one witness who personally, knows whereof he testifies, even though a party, is controlling, if not affected, by any inherent weakness materially impairing its credibility and not purely upon evidence in the field in which the judge presumably has the specific knowledge of an expert."

In *Stone* v. *Stone*, 136 Fed. 2d, 761, 764:

"In this case, there was positive testimony, uncontradicted and not inherently improbable, neither a jury nor a judge is at liberty to disregard such evidence.

* * *

"Where the testimony is all one way and is not immaterial, irrelevant, improbable, inconsistent, contradicted or discredited, such testimony cannot be disregarded or ignored by judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results, for which the verdict or decision, if reviewable, must be set aside. To hold otherwise, would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen."

In *Harrigan* v. *Gilchrist*, 99 Northwestern 909 (Wis.):

"It seems that in setting aside Mr. Owen's evidence as false, the court overlooked the familiar rule

that the undisputed reasonable evidence of one witness, though a party interested should be given controlling weight, in determining a question of fact."

In *Marks* v. *New Orleans Cold Storage Co.*, 31 So. 671 (La.), held that interested persons are, by our law, competent witnesses and their testimony is binding on the Court unless overcome by counter testimony, or irreconcilable with the known facts of the case.

In *St. Andrassy* v. *Mooney*, 262 N. Y. 368, 372:

"It is said that the testimony of the defendant and his wife is interested and discredited. Interested it may be, but we find no ground upon which it may be discredited. It is probable, and the claim that it contains inconsistencies and improbabilities and contradictions, is without substance. Indeed, the surrounding circumstances speak forcibly in its support and it is corroborated by the testimony of the discharged chauffeur—even though that testimony may not be itself conclusive."

In *Hull* v. *Littauer*, 162 N. Y. 569, at 572:

"It is true that the evidence to establish the entirety of the contract was given by the defendant; but the rule which the plaintiff invoked is not applicable to such a case as this. Generally, the credibility of a witness, who is a party to the action, and, therefore, interested in its results, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitation to accept his statement, it is a necessary and just rule that the jury should pass upon it. Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness."

In *Epremiam* v. *Ward*, 169 Fed. 691, at 696:

> "The court is bound to give credence to uncontradicted testimony even from interested persons when it is substantiated as it was here, and is not inconsistent with well-known facts, experiences and reason."

In *Powers* v. *Wilson*, 203 App. Div. 232, page 236:

> "There is another exception, however, to the rule that the credibility of the testimony of an interested witness is one of fact for the jury. It is the settled law of this State that where 'the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness.'"

In *Atlantic Coast Line Railroad Company* v. *Anderson*, 221 Fed. 2d, 548, 551:

> "The undisputed and unimpeached evidence of the engineer, the only eye witness, establishes that this could not have been done, and it is settled law that, with the record standing thus, the jury may not disregard his testimony to turn to speculation."

The Testimony of the Respondent Denying the Occurrence of the Accident is Purely Negative Testimony, Contrary to the Physical Facts, and, Therefore, Does Not Constitute Evidence

The Court, having found the presence of large pieces of ice in the slip, it must be accepted as a positive fact that a collision between such large piece of ice and the barge was likely to occur.

The testimony of Malvicini and Peters that they could not recall any heavy impact the night of the accident is purely negative testimony entitled to no weight whatsoever.

Positive and Negative Testimony

In *Moore on Facts*, Section 1188, the law was stated as follows:

> "If a credible witness with apparently adequate opportunity for observation, testifies to the occurrence of a fact, no conflict arises by the testimony of other witnesses that they were not cognizant of the occurrence where the latter witnesses' opportunities for observation are not stated, or where it affirmatively appears that their situation was such or their attention was so engrossed with other matters that they probably would not have observed the fact if it had occurred, or where their opportunities were not co-extensive with those of the witnesses who testified positively to the fact.

In *Stitt* v. *Huidekopers*, 84 U. S. 384, page 394. On this subject, the Court charged the jury:

> "That it is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed."
>
> "We are of the opinion that the charge was a sound exposition of a recognized rule of evidence of frequent application, and that the reason of the rule, as stated in the charge, dispenses with the need of further comment on it here."

32 C. J. S. 1083 (discussing negative testimony):

> "and such probative force is, of course, reduced to absolute zero, where the fact might have reasonably occurred without being observed by or known to the witness."

In *Ford On Evidence*, Section 83:

> "The testimony of the witness to the absence of a fact must indicate such a knowledge of the situation as will enable him to testify with some degree of certainty."

In Vol. 10 *Ruling Case Law*, 1010:

"Negative testimony proper is entitled to no weight. If a credible witness with apparently adequate opportunity for observation testifies to an occurrence, no conflict arises by the testimony of other witnesses that they were not cognizant of the occurrence, where the latter witnesses' opportunities for observation are not stated, or where it affirmatively appears that their situation was such or their attention was so engrossed that they probably would not have observed the event if it had occurred, or where their opportunities were not co-extensive with those of the witnesses who testified positively to the occurrence."

In Vol. 20 *American Jurisprudence*, page 1037:

"The reason generally given why negative evidence is regarded as of less weight than positive evidence is that the memory of a witness is more reliable where he testifies to the occurrence of an event than where he testifies to its non-occurrence. It is said that testimony as to the non-occurrence of an event may be given simply because the witness does not remember any such event ever having occurred, whereas a witness will not ordinarily testify affirmatively to the occurrence of an event unless at some time or other the event has actually happened. As has been pointed out, however, testimony that an event occurred may be given under a mistaken belief or from vagueness of memory just as much as testimony that the event did not occur, or it may be simply the product of the witnesses' imagination."

* * *

"The above considerations raise the question whether the rule ought not to be confined to cases in which the negative testimony is in the form of a denial of any knowledge as to the occurrence of the event, such as 'I did not hear', 'I did not see', etc., as distinguished from statements amounting to outright denials. This question in turn, raised the query whether the true basis for the rules as to positive and negative testimony is not simply that

> as a general rule, positive testimony is direct and unequivocal, subjecting the witness to prosecution for perjury if it is not true, whereas, negative testimony, at least such testimony as 'I did not see" 'I did not hear', etc., is indirect and equivocal, being insufficient to support a prosecution for perjury if it turns out that the witness was wrong."

The testimony of Costello that there was no heavy impact is entitled to little weight because there is no proof of facts upon which his knowledge can be based.

Wigmore Evidence, Sections 659, 664.

Besides from his position in the wheelhouse, some distance above the deck of the tug he could not see any ice as it hit the barge, for the reason that his view was cut off by the house on the barge that extended 15 feet above the deck of the barge; and besides the light was insufficient; he could not hear any impact because of the continuous noise created by pieces of ice striking the barge and the tug and further because of the noises incident to the operation of the tug; he could not possibly feel any impact of ice with the barge because he was not on the barge and no jar or impact could be felt where he was stationed, particularly because there was little physical contact between the barge and the tug and that was had some 30 feet from the front of the barge.

Gorska produced all of the evidence within his power and control, nothing more could have been expected of him.

In *Layer* v. *City of Buffalo*, 274 N. Y. 135, 140:

> "We should not demand too much in the way of evidence of negligence from the plaintiffs, who are not in a position to make a thorough examination and determine what caused the bursting of the water main. 'All evidence', said Lord Mansfield in Blatch v. Archer (1 Corp. 63, 65), 'is to be weighed according to the proof which is in the power of one side to produce and the other side to have contradicted.'"

To the same effect:

United States v. *Roberson*, 233 Fed. 2d 517.

It would seem that irrespective of the manner in which Gorska twisted his back, he did suffer an injury while performing duties under conditions which exposed this young inexperienced seaman to undue hazard. See: *United Pilots Assn.* v. *Halecki*, 79 S. Ct. 517, wherein the Court stated at page 519:

> "The eventful development of the doctrine of unseaworthiness in this Court is familiar history. Although of dubious ancestry,[2] the doctrine was born with the Osceola[3] and emerged full-blown 40 years later in Mahnich v. Southern S.S. Co.[4] as an absolute and non-delegable duty which the owner of a vessel owes to the members of the crew who man her. The justification for this rigid standard was clearly stated in the Court's opinion in Mahnich:
>
> > 'He (the seaman) is subject to the rigorous discipline of the sea and all the conditions of his service constrain him to accept, without critical examination, and without protest, working conditions and appliances as commanded by his superior officers.' 321 U. S. 96, at 103.
>
> With the nature of the duty thus defined, it remained for two other decisions of the Court to amplify its scope. Seas Shipping Co. v. Sieracki and Pope & Talbot v. Hawn[5] made clear that the shipowner could not escape liability for unseaworthiness by delegating to others work traditionally done by members of the crew. Whether their calling be labeled 'stevedore,' 'carpenter,' or something else, those who did the 'type of work' traditionally done by seamen, and were thus related to the ship in the same way as seamen 'who had been or who were about to go on a voyage,' were entitled to a seaworthy ship. See 346 U. S. at 413."

The uncontradicted evidence and the physical facts place this case squarely within the four corners of the decision in *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502, 510, wherein the Court stated:

> "Before allowing the ferriage operation he was under obligation to assure himself by inquiries or by personal inspection that the 'Linseed King' should not incur the hazard of colliding, as she did, with ice floes in the river."

The Court below was in error in failing to consider the entire record which record demonstrates that the findings of the Trial Court were not supported by the evidence. See:

Skibs. A/S Jolund, 250 Fed. (2d) 777, at page 782;
Mandelbaum v. *United States*, 251 Fed. (2d) 748, 752;
Mosson v. *Liberty Fast Freight Co. Inc.*, 124 Fed. (2d) 448, 450.

The Trial Court stated that it was not satisfied with certain proof adduced by the plaintiff. It is submitted that if the Trial Court was uncertain where justice lay, it was its obligation to call available witnesses about whose version it was concerned. The Trial Court had, at its command, the means of exploring this question as fully as it chose.

The Principle of Law that a Civil Plaintiff Sustains His Burden of Proof Upon Presenting a Fair Preponderance of Credible Evidence Has Been Rejected and in its Place Has Been Substituted the Requirement of Proof Beyond a Reasonable Doubt.

The Trial Court held that a fair preponderance of the evidence was sufficient to warrant a judgment on the cause of action for maintenance and cure, but the same evidence left a reasonable doubt which was sufficient to deny recovery for damages. The Court below sustained this view.

The Trial Court having a feeling of some doubt (as stated in its opinion) by reason of absence of certain proof,

the Court was in a position to direct the production of such proof and in the interest of justice should have done so, so as to eliminate such doubt.

Mr. Justice Frankfurter, stated in the dissenting opinion in *Johnson* v. *United States*, 68 Sup. Ct. 391, at page 395 (333 U. S. 47):

> "While a court room is not a laboratory for the scientific pursuit of truth, a trial judge is surely not confined to an account obviously fragmentary, of the circumstances of a happening, here the meagre testimony of Johnson, when he has at his command the means of exploring them fully, or at least more fully, before passing legal judgment. A trial is not a game of blind man's buff; and the trial judge—particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law—need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony."

Conclusion

The Court below has erroneously sustained the Trial Court by misinterpreting and misapplying the provisions of Rule 52-A of the Federal Rules of Civil Procedure, so as to deny to a seaman the remedy provided to him by Congress, and therefore the petition for a writ of certiorari should be granted so that all seamen might have the protection of remedial legislation as enacted by Congress, 46 U. S. C. A. Sec. 688, commonly known as the *Jones Act*.

Respectfully submitted,

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On the Brief:
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Appendix A

LUMBARD, *Circuit Judge.*

The appellant, a seaman employed on defendant's tug, "Atlantic City," appeals from defendant's judgment entered after trial before Judge Thomas F. Murphy without a jury on appellant's suit under the Jones Act, 46 U. S. C. A. § 688 for injuries allegedly sustained on the evening of February 16, 1955 as a result of defendant's negligent handling of the Atlantic City while shifting barges at a Jersey City slip. The railroad does not challenge the ruling in favor of Gorska on his claim for maintenance and cure on a finding by the court that his injury, a massive herniation of an intervertebral disc, was sustained in the course of his throwing a mooring rope to the shore from the barge on which he was stationed while it was being shifted by the Atlantic City.

The sole issue is whether Judge Murphy's finding on oral and documentary evidence that the negligence, if any, of defendant in towing the barge alongside the tug through icy waters was not a cause in fact of the appellant's injury is clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A.; McAllister v. United States, 1954, 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20; United States v. U. S. Gypsum Co., 1948, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746. We find that it is not, and we affirm the judgment below.

Plaintiff, the only witness to the alleged accident, claimed that as he was about to throw the mooring rope the barge violently collided with a block of ice in the slip, causing him to twist his back so as to produce the admitted injuries. The district court did find that ice was prevalent in the slip at the time. However, other employees of defendant who were present on the tug at the time of the alleged collision testified to no recollection of an impact. Their testimony is not without probative force, although since they were not on the barge such a collision might

have occurred without transmitting the shock to the tug and thus escape their notice. Furthermore, although plaintiff claimed that he had told several persons of the alleged cause of the accident shortly after the injury, those who were called denied that he had done so, and neither plaintiff's doctor, who treated him subsequent to the injury, nor the doctor's records were produced. Finally, although the record of the plaintiff's subsequent admission to the Public Health Service Hospital, nine days after the injury and after private treatment, did disclose that he then claimed that the injury occurred while he was in the course of throwing the rope, it recited no claim of an accompanying impact.

Competent medical evidence sufficiently established that the plaintiff's injury could have been sustained without the occurrence of the alleged impact. Judge Murphy's discounting of Gorska's version of the cause of his injury is well supported by the record.

Judgment affirmed.